United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2084

To Be Argued by
FRANK A. LOPEZ, ESQ.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2084

UNITED STATES OF AMERICA, ex rel. JULIO JUVENTINO LUJAN, on the petition of FRANK A. LOPEZ,

Petitioner-Appellant,

-against-

WARDEN LOUIS GENGLER, Superintendent Federal Detention Headquarters, New York City, HON. DAVID G. TRAGER, United States Attorney for the Eastern District of New York, and any other person having custody and control of the relator,

Respondents-Appellees.

APPELLANT'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DENYING AND DISMISSING A PETITION FOR HABEAS CORPUS RELIEF.

FRANK A. LOPEZ
Attorney for Petitioner-Appellant
JULIO JUVENTINO LUJAN
31 Smith Street
Brooklyn, New York 11201
Telephone (212) 237-9500

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, ex rel. JULIO JUVENTINO LUJAN, etc.,

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APPELLANT'S BRIEF

Preliminary Statement

Julio Juventino Lujan[1] appeals from the Order of June 21st, 1974, denying and dismissing his petition for Habeas Corpus relief entered in the United States District Court for the Eastern District of New York (Jacob Mishler, Ch.J.) on June 24th, 1974.

The application for the Writ filed in the District Court (74 Civil 928), sought the dismissal of an indictment filed in that Court under Docket No. 73 Cr. 677, charging Lujan with a Conspiracy to violate the Narcotic Laws of the United States embracing a period from March 1st, 1970 and January 31st, 1972, 21 U.S.C. §§§§§§ 174, 812, 841(A)(1), 841(B)(1)(a), 960(A)(1) and 960(B)(1). The petition for the Habeas Corpus Writ was grounded on similar facts leading to the decision in United States v. Toscanino, 500 F.2d 267 (2nd Cir.1974), reh.en banc denied, September 24th, 1974.

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[1] Hereinafter referred to as "Lujan".

QUESTIONS PRESENTED FOR REVIEW

1. Was habeas corpus relief improvidently denied in the light of United States v. Toscanino, supra, and in view of the forcible abduction of Lujan into the United States by the joint efforts of American agents and Bolivian police acting ultra vires in violation of the International Treaties, agreements and obligations of the United States with the Organization of American States (OAS) under the Charter of the United Nations and Bolivia and Argentina?

2. Is United States v. Toscanino, supra, retroactive affording Lujan relief?

STATEMENT OF FACTS

On July 19th, 1973, an indictment was filed against Julio Juventino Lujan and eight other co-defendants (docket no. 73 Cr. 677) in the District Court for the Eastern District of New York charging Lujan and others in one count with Conspiracy to Violate the Federal Narcotics Laws. It was the Government's theory that Lujan and others had agreed to move large quantities of heroin into the United States, e.g. one such operation mentioned in the overt acts of the indictment covered a shipment of one hundred (100) kilograms of heroin in December, 1971, to Mexico City, Mexico. The unspecified inference was that the drugs were destined for the United States.

At the time of the filing of the indictment Lujan was not in the United States and Chief Judge Mishler issued a bench warrant for him. On July 24th, 1973, the District Court ordered the indictment sealed.

In a petition verified June 19th, 1974, by assigned counsel Frank A. Lopez, Esq. for Lujan, uncontroverted by the Government and for the purpose of the Court's decision (denying the writ) accepted without evidentiary hearing as true, the manner and method in which Lujan was forcibly abducted into the United States was setforth:

(a) On/or about Octcber 26th, 1973, Lujan flew an airplane on a chartered flight from Argentina into Bolivia. This was a legal flight with flight clearance given by Argentine and Bolivian authorites. The flight was arranged by American agents who lured Lujan to fly from Argentina into Bolivia under the pretext of flying a passenger who had business with American interests in Bolivian mines. On arrival in Bolivia, the local police placed Lujan in custody without formal charge of any kind. He was not permitted to communicate with the Argentine Embassy, an attorney, or any member of his family. The compromised Bolivian police did not have lawful mandate from their own law enforcement authorities to effect the detention of Lujan They were in effect bribed by American agents.

(b) On/or about October 27th, 1973, Lujan was taken by the Bolivian armed police from Santa Cruz to LaPaz, Bolivia without his consent and under the threat of force and again held incommunicado. In charge of this operation was Major Guido Lopez of the Bolivian Police, who at times during the Lujan detention skirted his own police less inquiry be made reference Lujan.

(c) On/or about November 1st, 1973, Lujan was then taken by Bolivian Police (Lieutenant Terrazas and American C.I.A. agents or operatives) in Bolivia to the airport where he was forcibly abducted and placed on an airplane and taken to New York.

(d) On/or about November 2nd, 1972, Lujan arrived at Kennedy Airport in Queens, New York, within the Eastern District of New York and was thereafter formally arrested and charged for the first time by additional Federal agents who were waiting for him.

(e) United States Law Enforcement Officers acting covertly with the Bolivian Police were able to abduct Lujan, a national of a third country, Argentina, without any lawful intervention, to wit, formal charge by the Bolivian Police or formal charge or request for extradition by the United States Authorities under applicable and existing treaties.

POINT ONE

LUJAN'S FORCIBLE ABDUCTION THROUGH THE JOINT EFFORTS OF AMERICAN AGENTS AND BOLIVIAN POLICE ACTING ULTRA VIRES IN VIOLATION OF INTERNATIONAL TREATIES AND OBLIGATIONS VIOLATED DUE PROCESS OF LAW.

Lujan's forcible abduction from Bolivia without sanction of law and in violation of the treaties and obligations of the United States under the accords and agreements reached with foreign countries and through the Organization of American States and the United Nations Charter coupled with a due process violation places him within the ambit of United States v. Toscanino, 500 F. 2d 267 (2nd Cir. 1974), rehearing en banc denied September 27th, 1974. Simply stated, Toscanino, "holds that the kidnapping of the foreign national by American agents would, if proven at a hearing, deprive the district court of jurisdiction to try him." (Circuit Judge Mulligan, dissenting on the rehearing application on Toscanino).

In Toscanino, supra, due process requirements enunciated earlier in Rochin v. California, 342 U.S. 165 (1952), were aimed at preventing the Government from realizing directly the fruit of its own deliberate and unnecessary lawlessness in bringing the accused to trial. Rochin emphatically inserted the elements of decency and fairness into the concept of due process of law, in judging the acceptability of Government conduct:

> "Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples, even toward those charged with the most heinous crimes."

In Toscanino, the Court expressed disatisfaction with Ker v. Illinois, 119 U.S. 435 (1963) and Frisbie v. Collins, 342 U.S. 519 (1952) to the effect that "due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional safeguards." An expanded concept of due process now prevents the Government from exploiting its own illegal conduct, "and when an accused is kidnapped and forcibly brought within the jurisdiction, the Court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, * * * the government should as a matter of fundamental fairness be obligated to return him to his status quo ante."

Thus, Toscanino, supra, firmly rejects the proposition that a federal court may assume jurisdiction over a foreign national, forcibly abducted from foreign soil, without resort to extradition proceedings in violation of international treaties and obligations and with the complicity and corruption of local police acting ultra vires. Seemingly, this decision overturned Frisbie v. Collins, supra, decided the same term as Rochin, supra, which approved of an interstate abduction for the assumption of jurisdiction over a person charged with crime. However, it must be pointed out that Frisbie was a State prosecution, where the scope of federal review is more limited than where the case emanates from a federal tribunal. No international treaties or commitments were involved nor the shocking element of a foreign national whisked from abroad, without any judicial intervention. In short, the fact situation in Frisbie was not as unconscionable and disturbing as Toscanino. Therefore, at the

outset we need not reach the issue whether Toscanino and now Lujan rejects Frisbie since each are confined to their own facts. In Toscanino the Court wrote:

> "We must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct. . .and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees the right of the people to be secure in their persons against unreasonable seizures, the government should as a matter of fundamental fairness obligated to return him to his status quo ante. . . Accordingly we view due process as now requiring of the government's deliberate, unnecessary and unreasonable invation of the accused's constitutional rights. . . In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction. . ."

Lujan was lured from Argentina into Bolivia on October 26th, 1973, on a ruse employed by the C.I.A. Once in Bolivia, the local police corrupted by American agents forcibly seized Lujan, held him in custody and incommunicado without charge, and through force placed him on a plane on November 1st, 1973, to New York, where on arrival at Kennedy International Airport he was formally arrested by Federal agents on November 2nd, 1973. There was no effort to comply with extradition treaties between the United States and either Bolivia or Argentina. The fact pattern and objective in Lujan is identical with Toscanino.

POINT TWO

THERE ARE NO CONSIDERATIONS OF RETROACTIVE EFFECT THAT SHOULD PRECLUDE THIS COURT FROM GIVING FULL EFFECT OF THE TOSCANINO RULING TO THIS CASE.

In Linkletter v. Walker, 381 U.S. 618 (1965), the Court applied the benefits of the Mapp v. Ohio, 367 U.S. 643 (1961), ruling barring the use of illegally seized evidence in State trials, to all cases in the appellate process at the time of the pronouncement, but declined to apply the ruling to cases that had already come to appellate rest, stating, "the thousands of cases that were finally decided on Wolf cannot be obliterated. . . To make the rule of Mapp retrospective would tax the administration of justice to the utmost." Since Lujan follows Toscanino, there would seem to be no issue of retroactive application and the rule should be followed. Indeed, it is not the date of the illegal conduct of the Government that is crucial, but the date of the judgment of the Court decreeing it that fixed the cut-off point. The Court further noted in Linkletter, supra, "Nor can we accept the contention of petitioner that the Mapp rule should date from the day of the seizure there rather than that of the judgment of this Court. The date of the seizure in Mapp has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." The date of the Toscanino decision predated the litigation of the identical issue in the case at bar by design since Chief Judge Mishler suggested that counsel for Lujan withdraw his earlier petition for relief pending the determination

in Toscanino as effecting the instant litigation.[2] There is no reason not to apply the benefits of Toscanino to appellant, since such application would be prospective in nature in the instant case.

The Government cannot claim reliance in the instant case on Frisbie v. Collins, supra, since the abduction of foreign nationals has been committed in the past in defiance of international treaties and the obligations of this country under the United Nations Charter and the accords reached through the Organization of American States. Moreover, the United States cannot be a party to international lawlessness and banditry and the interest already expressed by the foreign government involved should be of concern to the United States.[3] It would be unthinkable for this Court to render

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2 On January 18th, 1974, a motion was made in the United States District Court (E.D.N.Y.) in behalf of Lujan, which was withdrawn pending Toscanino. Toscanino was decided May 15th, 1974. On June 7th, 1974, Lujan moved to dismiss the indictment. Chief Judge Mischler in the light of Toscanino dismissed the indictment. However, the Government and counsel Lujan agreed that there was nothing defective about the indictmer only Lujan's presence before the Court. On June 21st, 1974, Ch.J. Mischler reversed himself, reinstated the indictment and denied Habeas Corpus relief for Lujan. The defense appealed and procedurally this is the present posture of the case.

3 The Argentine Counsulate and Embassy have maintained communications with assigned counsel with reference to Lujan and Toscanino. The Toscanino and Lujan case has received publicity in the public media in Spanish-speaking America.

a decision approving the kidnapping of a foreign national irrespective of when it happened, as it would to sanction the use of a stomach pump to retrieve evidence from a person's internal organs, as was condemned in Rochin v. California, supra, merely because the brutality predated the decision in that case. Considerations of retroactivity have no place where the Government's conduct reviewed by the Court is itself criminal in nature defying concepts of fairness and decency. In order to bring Lujan before the District Court the Government relied not only on Frisbie v. Collins, but also on bribery, kidnapping, official corruption, just to mention a few of the crimes committed. Moreover, such conduct if approved would be an incentive to other Governments to condone such conduct on their part and thus threaten the security of citizens of the United States. How could we protest actions against American citizens while sanctioning such conduct against foreign nationals?

CONCLUSION

THE ORDER DENYING AND DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE REVERSED AND THE APPLICATION GRANTED, HABEAS CORPUS RELIEF SHOULD BE SUSTAINED AND LUJAN RETURNED TO ARGENTINA, HIS COUNTRY OF ORIGIN.

Respectfully submitted,

FRANK A. LOPEZ
Attorney for Appellant
Julio Juventino Lujan
31 Smith Street
Brooklyn, New York 11201
Tel. (212) 237-9500

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA,

Appellee,

-against- Docket No 74-2084

JULIO JUVENTINO LUJAN

Appellant

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STATE OF NEW YORK)
) ss :
COUNTY OF KINGS)

MARGIE TORRES, being duly sworn, deposes and says

That I am over the age of eighteen years and reside at 31 Smith Street, Brooklyn, New York 11201

That I served two copies of the appellant's brief and two copies of the appellant's appendix on October 17th, 1974, in the matter of the United States vs Julio Juventino Lujan, Docket No 74-2084, in a case pending in the United States Court of Appeals for the Second Circuit, by mailing the same in a sealed envelope, with postage prepaid thereon, in an official depository of the U.S. Postal Service within the State of New York, addressed as follows: Assistant United States Attorney Edward R. Korman, United States Attorney's Office, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201.

Margie Torres
MARGIE TORRES

Sworn and subscribed to before me
this 17 day of October, 1974.

Frank A. Lopez

FRANK A. LOPEZ
Notary Public, State of New York
No. 24-7596075
Qualified in Kings County
Commission Expires March 30, 1976

Index No. 74§2084 *Year 19*

UNITED STATES OF AMERICA
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JULIO JUVENTINO LUJAN,

Defendant-Petitioner-Appellant,

AFFIDAVIT OF SERVICE OF APPELLANT'S BRIEF AND APPENDIX UPON THE UNITED STATES OF AMERICA.

Attorney for **FRANK A. LOPEZ**
Appellant Julio Juventino Lujan

31 SMITH STREET
BROOKLYN, NEW YORK 11201
(212) 237-9500

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

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Check Applicable Box

Dated:

Attorney for **FRANK A. LOPEZ**

31 SMITH STREET
BROOKLYN, NEW YORK 11201

To:

Attorney(s) for

N 912 CL